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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

PETITIONER

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, Jr., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

RESPONDENTS

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I. J. GROMFINE,
HERMAN STERNSTEIN,
WILLIAM B. PEER,
1001 Connecticut Ave., N. W.,
Washington 6, D. C.

ISAAC N. GRONER,
1411 K Street, N. W.,
Washington 5, D. C.
*Attorneys for Petitioner*

*Of Counsel:*
ZIMRING, GROMFINE AND STERNSTEIN
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

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RESPONDENTS

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, WES Chapter, Flight Engineers' International Association, AFL-CIO, prays that a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit in this case to review the judgment of the United States District Court for the District of Columbia.

## OPINION BELOW

There was no written opinion in the District Court. The order of the District Court dismissing the complaint is printed in Appendix A, p. 15, *infra*. The complaint is printed in Appendix B, p. 17, *infra*. Exhibit 5 attached to said complaint is printed in Appendix C, p. 27, *infra;* and Exhibit 7, Appendix D, p. 29, *infra*.

The only action by the Court below was an order on November 6, 1961, granting petitioner's motion that the record be transmitted to this Court for use on petition for certiorari. Respondent Western Air Lines, Inc. (hereinafter "Western") filed an opposition, urging in essence that petitioner's position was not sufficiently meritorious to justify the consideration of this Court prior to the decision below. The Court below rejected this opposition and granted petitioner's motion so that the case would be put before this Court at this time.

## JURISDICTION

Jurisdiction for this action was founded upon 28 U.S.C. §§ 1331, 1337, Comp., par. 2, App. B, p. 17, *infra*. Summary judgment against petitioner dismissing its complaint was entered by the United States District Court for the District of Columbia on October 18, 1961. Petitioner docketed its appeal in the United States Court of Appeals for the District of Columbia Circuit by filing the original record in the Court of Appeals on October 25, 1961. Petitioner is invoking the jurisdiction of this Court to grant certiorari before judgment in the Court of Appeals because the issues of judicial review of actions of the National Mediation Board (hereinafter "Board") in labor representation cases arising under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (hereinafter "Act"), when such administrative actions are alleged to exceed the Board's substantive authority and its procedural powers, and the issue whether the Board has diluted its procedures below the minimum standards imposed by the Due Process Clause—issues pending before the Court upon the petition in *UNA Chapter*,

*Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board, et al.*, No. 531, October Term, 1961—are so amplified and illuminated by the record herein as to render concurrent consideration of the cases a matter of "imperative public importance." Rule 20; cf. *Taylor* v. *McElroy*, 360 U.S. 709, 710; *Bolling* v. *Sharpe*, 347 U.S. 497, 498.[1]

## QUESTIONS PRESENTED

1. Does the District Court have jurisdiction and power to grant relief over the claim that the Board is destroying petitioner's bargaining and property rights by action taken in plain contravention of the Board's own rules governing the conduct of labor representation elections under the Act?

2. May Board action legally stand which is based upon the Board's violation of one of its own Rules—the Rule that dismissed employees shall be eligible to vote whenever their requests for reinstatement on account of wrongful dismissal are pending before proper authorities?

3. Does the District Court have jurisdiction and power to grant relief over the claim that the Board violated the Due Process Clause, as well as the substantive provisions of the Act, by refusing to require the presence of witnesses whose testimony was essential properly to determine whether a challenged labor organization was assisted by the employer in contravention of the Act, and by deciding

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[1] The primary issue presented on these petitions is jurisdictional, whether the District Court has power to adjudicate a claim and grant relief in Board representation cases *under any circumstances*. The judgment of the Court below that there is no such jurisdiction is reflected in its opinions in the *UNA Chapter* case and in *Airline Stewards and Stewardesses Association, International* v. *National Mediation Board, et al.* U.S. App. D.C. No. 16340, also decided on July 13, 1961, petition for rehearing denied, September 20, 1961, in which we are advised that a petition for certiorari is being prepared and will be filed. In this case, the District Court orally indicated its reliance upon these decisions of the Court of Appeals, as well as *Switchmen's Union* v. *Board*, 320 U.S. 297. It would appear that the Court below would invariably deny jurisdiction over any claimed excess or abuse of the Board in a representation case, until this Court directs otherwise.

on the basis of such an incomplete hearing that the organization was not thus unlawfully assisted?

4. Does the Board procedure described in the foregoing Question invalidate any administrative action taken pursuant thereto?

## STATUTES INVOLVED

The statutory and administrative provisions involved in this case are set out in Appendix E, p. 30, *infra*.

## STATEMENT

### Background

Petitioner is a labor organization composed of flight engineers employed by Western; and its sole function and reason for existence is collective bargaining representation of these employees. Petitioner had been the duly certified representative under the Act, and had collective bargaining agreements with Western, for some years, until the events involved herein.

On February 17, 1961, in reaction to the decision of the Board which led to the *UNA Chapter* case, *supra*, pending on the companion petition, the flight engineers employed by many air lines, including Western, walked off their jobs. Upon the intercession of the Executive Branch and the personal participation of the Secretary of Labor, the walkout ended on or about February 23, with the creation of a Presidential commission to consider the issues involved, Executive Order 10921, 26 Fed. Reg. 1553, amended for the express purpose of including Western by Executive Order 10922, 26 Fed. Reg. 1655, and with a back-to-work agreement pledging the air lines not to engage in legal or disciplinary action against the flight engineers. Alone of all the airlines involved, Western refused to accept this agreement.

Western fired each and all of its flight engineers represented by petitioner, between February 19 and 23, 1961, for refusing to accept flight assignments during the walkout. Comp., par. 10, App. B, p. 19, *infra*. On or about February 23, 1961, each of these employees made an uncon-

ditional offer to return to work, pursuant to the Executive Orders. Prior to and subsequent to said offers to return to work, Western employed individuals who were designated as "second officers" in place of the discharged flight engineers.

ACTIONS OF THE BOARD

On or about April 5, 1961, respondent Second Officers' Association (hereinafter "SOA"), an unincorporated association composed of the replacement "second officers," filed an application with the Board to represent the Western flight engineers. Two different actions of the Board in dealing with that application gave rise to this litigation.

1. The Board ruled that only flight engineers on the current payroll of Western would be permitted to vote in a labor representation election ordered by the Board, rejecting petitioner's demand that the Board's own Rule 6 be applied to make eligible the flight engineers represented by petitioner who had been dismissed. Rule 6, 29 C.F.R. § 1206.6, set out in its entirety at App. E, p. 32, *infra*, reads in pertinent part as follows:

> "Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities * * * are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal."

Petitioner advised the Board that these flight engineers came within each requirement of the Rule. They had been dismissed by Western for failure to accept a flight assignment, and so were "dismissed employees". Further, they satisfied the only other requirement to be eligible to vote under Rule 6, that their requests for reinstatement on account of wrongful dismissal be "pending before proper authorities". Petitioner specified the following three proper authorities:

A. The United States District Court for the Southern District of California, in Civil Action No. 510-61-PH, wherein each of these employees, as parties defendant, had filed a counterclaim demanding restoration and reinstatement to his job.

B. The System Board of Adjustment established by the agreement between petitioner and Western, pursuant to which petitioner had submitted grievances to the effect that these discharges "were made without sufficient cause and that each of these employees should be reinstated with back pay forthwith."

C. The Presidential Commission appointed pursuant to the Executive Orders.

In the face of this showing, the Board said, on July 20, 1961, that petitioner's objections to the electorate based on Rule 6 were "without merit under the Board's rules." App. D, p. 29, *infra*. No explanation or further word has ever been tendered by the Board.

2. Upon being notified of SOA's application, petitioner advised the Board, upon information and belief, that SOA was an organization illegally assisted by Western in violation of Sections 2, Third and 2, Fourth of the Act, set out at App. E, pp. 30-31, *infra*. See Comp., pars. 13-17, App. B, pp. 20-22, *infra*, for the factual allegations regarding this claim. Petitioner requested a hearing on the issue of SOA's being formed and making application to the Board in violation of the Act, and the Board granted a "public hearing."

Prior to the hearing, petitioner advised the Board that the basic proofs as to the relationship between Western and SOA were in the possession and control of those parties rather than the petitioner; and requested the Board to make available at the hearing certain witnesses and documents specified by petitioner as necessary to a proper record and decision on this issue.

The Board refused to make the requests for the evidence specified by petitioner. Petitioner thereupon itself requested this evidence from Western and SOA. At the hearing, however, none of this evidence was produced, except for the appearance of an SOA officer, who claimed lack of information or knowledge in response to the questions put by petitioner relating to the facts and documents demonstrating violation of the Act.

The Board then made a finding "that no fact was established from which even an inference—to say nothing of a

conclusion—can be drawn supporting either of the charges made by" petitioner. App. C, p. 28, *infra*. The Board's decision made no reference to the requests for evidence which the petitioner had submitted to the Board, nor to the fact that it had refused these requests. It recited that "A representative of the carrier was also present by invitation of the Board," without mentioning that this "representative" (an attorney) was present only as an observer and did not participate in the hearing, nor that Western's Director of Labor Relations, one of the witnesses whose presence was requested by petitioner and the one with knowledge of the allegedly unlawful activities of Western, did not appear.

### Actions of the Court Below

When the Board proceeded to direct an election and to conduct a mail ballot, to be counted on August 7, 1961, petitioner instituted this suit, in essence seeking to restrain and invalidate any further action which the Board might take on the assumpton that its administrative actions summarized above could be considered lawful. See App. B, p. 17, *infra*. The complaint recited the facts summarized above, attaching the pertinent documents which recorded them; and stated the two principal claims of fatal defect in the Board's action revealed by those facts—that the Board had violated its own Rule 6 in declaring ineligible the flight engineers represented by petitioner; and that the Board had violated its statutory responsibilities and duties, and the Due Process Clause of the Federal Constitution, in its decision and the "hearing" on the unlawful assistance issue.

With the complaint, petitioner filed motions for a temporary restraining order and a preliminary injunction. The former was granted on August 3, 1961 (*per* Pine, C. J.); the latter was denied on August 17 (*per* Hart, J.).

The Board then proceeded to the counting of the ballots and the certification of SOA. According to the affidavit of a Vice President of Western, submitted by the Government in support of its motion and incorporated in the rec-

ord on file with the Clerk of this Court, the number of dismissed flight engineers belonging to petitioner, who would have been eligible to vote had the Board adhered to its Rule, was 123. According to the Board's certification (likewise part of the record herein), the total number of ballots cast in the election was 93.

On October 18, 1961, after the hearing on the motions which meanwhile had been filed by petitioner for summary judgment and by the Government (with whose motion Western and SOA associated themselves upon their being granted intervention) to dismiss or alternatively for summary judgment, the District Court (*per* Holtzoff, J.) dismissed the complaint for failure to state a claim on which relief could be granted. This was the only ground included in the signed Order; additional statements that the Court lacked jurisdiction and that no substantial constitutional questions were presented, contained in the draft order submitted by the Government, were excised by the Court. App. A, p. 15 *infra*.

The only action taken by the Court of Appeals, as already noted, p. 2, *supra*, was to grant, over objection, petitioner's motion to transmit the District Court record, filed with that court in docketing the appeal herein, to this Court.

## REASONS FOR GRANTING THE WRIT

### I

This case, together with the *UNA Chapter* case, *supra*, presents issues of great importance to the proper enforcement of the Act and to administrative law generally, issues which have been resolved below in conflict with the governing decisions of this Court. This case amplifies and illuminates the issues of jurisdiction over substantively excessive and procedurally unconstitutional Board actions in representation cases, by presenting those issues in the context of violation by the Board of one of its own Rules.

In this case the prime claim is that the Board is depriving petitioner of its rights on the basis of an election in which

the Board refused to permit petitioner's members to vote, although they were eligible to vote under the express terms of the Board's own Rule 6. The practical impact of this illegality on this election was decisive, inasmuch as the number of flight engineers belonging to petitioner who were declared not eligible to vote much exceeded the number of those who voted. See p. 8, *supra*. In sum, the Board's knowing refusal to enforce its own rule dictated this election result.

When the District Court dismissed the complaint for failure to state a claim upon which relief could be granted, it held that Board actions in representation cases under the Act are immune from any judicial review or redress. Its judgment cannot stand if there is continuing vitality to the judgment of this Court in *Leedom* v. *Kyne*, 358 U. S. 184, and *Accardi* v. *Shaughnessy*, 347 U. S. 260.

*Leedom* v. *Kyne* held that there was jurisdiction, that the law does "afford a remedy" when there has been " 'unlawful action of the Board which has inflicted any injury on the respondent'." 358 U. S. at 189. Here the District Court has held precisely to the contrary—that a claim of unlawful action by this Board inflicting injury upon this petitioner can have no possible remedy under the law.

While *Leedom* v. *Kyne* involved a different statute and a different agency, the factual context was the same, an administrative determination of who should vote in a labor representation election; and this Court clearly indicated that the principle of judicial review of excessive agency action was to be applied generally. Indeed, the Court reflected an express judgment that the principle should apply to this Board. It fully discussed *Switchmen's Union* v. *Board*, 320 U. S. 297, which did involve this Board and this Act. 358 U. S. at 189-91; 194, 197-201 (dissenting opinion). And it expressly reconciled the *Switchmen's* holding with the *Leedom* v. *Kyne* principle. 358 U. S. at 189-190.

Moreover, the Court has indicated that *Leedom* v. *Kyne* has been assimilated into the general law of judicial review of administrative action. In *Schilling* v. *Rogers*, 363 U. S. 666, 676-677, for example, where it denied review upon the

conclusion that the complaint alleged merely that the administrative decision was erroneous, the Court cited *Leedom* v. *Kyne* in its description of the type of case where jurisdiction was to be upheld:

> "This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that *he has acted beyond the scope of his powers*, where the availability of judicial review would be attended by *quite different considerations* than those controlling here. Cf., *e.g.*, *Accardi* v. *Shaughnessy*, 347 U. S. 260; *Leedom* v. *Kyne*, 358 U. S. 184." (Emphasis added.)

Accordingly, *Leedom* v. *Kyne* is governing here to establish jurisdiction to grant relief on petitioner's claim of excessive Board action. The judgment below is in opposition to that of this Court.

*Accardi* v. *Shaughnessy*, *supra*, held that the Courts would hold administrative agencies to the terms of their regulations as scrupulously as those of statutes, in deciding upon judicial review whether an administrative action could be upheld. The *Accardi* principle has been followed in *Vitarelli* v. *Seaton*, 359 U. S. 535, and *Service* v. *Dulles*, 354 U. S. 363; cf. *Securities and Exchange Commission* v. *Chenery Corp.* 317 U. S. 80.[2] This principle has never

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[2] The Board has consistently adhered to Rule 6, prior to this case. We have found no cases, and none has been cited, where an employee asserting a right to vote under Rule 6 has previously been denied eligibility. Examples of Board decisions enforcing Rule 6 are: *United Air Lines*, Case No. R-1894 (October 10, 1947), where the employer challenged the eligibility of two employees on the ground that they had been terminated, while the Union contended that their suspensions had been improper; the Board permitted their votes to be counted because "there is a dispute between the carrier and the organization concerning the suspension" of the employees "which places these employees in the category described" in Rule 6; and *Minneapolis & St. Louis Ry. Co.*, Case No. R-2767 (April 2 and June 17, 1954), where the Board permitted an employee to vote, although he had been found guilty of a rules violation and barred from further service as a locomotive engineer, because a Union was handling a claim for reinstatement with the proper officers of the carrier, thus establishing eligibility under Rule 6.

been attenuated, let alone overruled, by this Court. Here the District Court has held precisely to the contrary—that this Board regulation may be violated and petitioner's rights thus destroyed, with the Board's action nevertheless to be left standing and effective upon the ground of utter lack of judicial power.

The principles of *Leedom* v. *Kyne* and *Accardi* v. *Shaughnessy* are manifestly of general applicability and major importance. They should not be disregarded or eroded by flatly contrary judgments of the lower Federal Courts. To vindicate those principles and in a proper case to assert the necessary supervisory powers of this Court, the petitions in this cause and in *UNA Chapter* should be granted.

## II

An additional facet of the scope of judicial review of Board conduct in representation cases is presented here by the Board's failure and refusal to comply with the requirements of the Act regarding petitioner's allegation that SOA was employer dominated. This Board conduct raises the "important questions" which led to the grant of the petition for certiorari in *Order of Conductors* v. *Penna. R. Co.*, 323 U. S. 166, 171, but which the Court did not decide because the Board was not there a party. Here the Board and its members are parties respondent, and these important questions should be answered by this Court.

In both cases the questions are directed to the Board's duty under the Act and the jurisdiction of the District Court to compel the fulfillment of that duty—to entertain representation applications, and make certifications, of only those organizations which have been formed and have obtained their membership in compliance with the Act. In *Order of Conductors, supra*, the Board took the position that it had no jurisdiction to decide issues such as unlawful interference or assistance—violations of Sections 2, Third and 2, Fourth, set out in App. E, pp. 30-31, *infra;* and precisely the acts alleged by petitioner against Western and SOA in the complaint in this case—whereas in this case

the Board did purport to adjudicate it. Under the allegations of the complaint, however, the Board's disposition of this matter was so obviously incomplete and unfair as to be tantamount to the abnegation of the Board's power and duty to adjudicate involved in the *Conductors* case. See App. B, pp. 20-22, *infra*.

The Board here refused to utilize powers readily available to it to make rational consideration possible of petitioner's allegations that Western had unlawfully assisted SOA. The Board refused to request Western's Director of Labor Relations to be present at the "public hearing" it scheduled, although this was the Company officer who petitioner said would have knowledge of the facts involved. The Board refused to request the SOA officers specified by petitioner as having the pertinent knowledge to be present at this "hearing," although SOA was the applicant; and as the applicant, SOA was obligated under the Act to prove its compliance with the Act to the satisfaction of the Board. Until compliance with the Act were proved, the Board was certainly under no compulsion to proceed with the processing of SOA's application; indeed, the Board was prohibited under the Act from certifying SOA. In addition, the Board refused to request Western to make available to petitioner certain documents such as correspondence with SOA which, petitioner stated, were manifestly germane to the assistance issue. The Board apparently regarded itself as impotent to investigate and obtain all needed evidence—but the Board expressly has power, under the last sentence of Section 2, Ninth, App. E, p. 31, *infra*, to investigate the books and records of the carrier, and to "utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The procedure followed by the Board on this issue was a transparent sham. The Board should have regarded its function as properly deciding whether or not SOA was unlawfully assisted and therefore ineligible for certification. Its procedural powers should have been exerted to insure a complete and fair hearing on this issue, with all parties

being required to the utmost provided by the Act to produce for Board consideration all the testimony and evidence at their command. Instead, the Board confined its purpose to dismissing the petitioner's allegations; and to this end it restricted the hearing to the presentation of evidence by the petitioner. It is self-evident, however, that the issue could not possibly be fairly tried or lawfully decided on the basis of the petitioner's evidence. After all, unlawful domination and assistance of a union by an employer is a conspiratorial and wilful enterprise; the Board surely knew such an illegal relationship could not be proved when the allegedly illicit partners are not even requested, let alone compelled so far as the law permits, to disclose all the evidence they have; and, indeed, are sheltered by the Board from any official request that all such necessary and readily available evidence be put before the Board before any decision could be made.

Such an administrative procedure and decision falls fatally short of the standards imposed by the Act and by the "public hearing" the Board purported to give, cf. *Accardi* v. *Shaughnessy, supra;* and offends the Due Process Clause of the Constitution. This Court should not tolerate any holding that such an administrative performance is immune to judicial review and redress. Our Federal Courts are not so impotent to protect private individuals and institutions from the encroachments of administrative officials.

This jurisdictional question of judicial review of unconstitutional procedure, in the context of representation cases under the Act, an issue presented on the petition in the *UNA Chapter* case, *supra*, is presented here in a somewhat different setting which illuminates and clarifies the reach of the vital legal issues involved in the *UNA Chapter* case. In addition, the deliberately restricted Board procedures here raise questions, the importance of which this Court has recognized, addressed to the interpretation of Sections 2, Third, 2, Fourth, and 2, Ninth, and the Board's powers and duties thereunder. For this reason also this petition should be granted.

## CONCLUSION

For the reasons set forth herein, this petition for writ of certiorari should be granted, as well as that in the *UNA Chapter* case, No. 531, October Term, 1961, the companion petition; and these cases set down for argument together.

Respectfully submitted,
I. J. Gromfine,
Herman Sternstein,
William B. Peer,
1001 Connecticut Ave., N. W.,
Washington 6, D. C.

Isaac N. Groner,
1411 K Street, N. W.,
Washington 5, D. C.
*Attorneys for Petitioner*

*Of Counsel:*

Zimring, Gromfine and Sternstein
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

November, 1961.

## APPENDIX A

# United States District Court

FOR THE DISTRICT OF COLUMBIA

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|---|---|
| WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO<br>*Plaintiff*,<br>v.<br>NATIONAL MEDIATION BOARD, ET AL.,<br>*Defendants*. | Civil Action No. 2509-61 |

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### ORDER

Upon consideration of defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment, plaintiff's Motion For Summary Judgment, and the Opposition Of Intervenor Western Air Lines, Inc. To Plaintiff's Motion For Summary Judgment, and intervenors having joined in the said motion of defendants, and the Court having further considered the pleadings, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motions, and after hearing oral argument by counsel for the respective parties in open Court, and the Court having determined that there is no genuine issue of material fact, ~~and it appearing to the Court that the Court has no jurisdiction over the subject matter, that no substantial Constitutional question is presented,~~ and that the complaint fails to state a claim upon which relief can be granted, it is by the Court on this 18th day of October, 1961.

ORDERED that defendant's [sic] Motion For Summary Judgment be and the same is hereby granted, and it is

FURTHER ORDERED that defendants' alternative Motion To Dismiss be and the same is hereby denied as moot, and it is

FURTHER ORDERED that plaintiff's Motion For Summary Judgment be and the same is hereby denied and the complaint be and the same is hereby dismissed.

(s) ALEXANDER HOLTZOFF
*United States District Judge*

## APPENDIX B

[Caption Omitted]

### COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

1. This is an action of a civil nature to compel compliance by the National Mediation Board (hereinafter "the Board") with the Act creating and defining its authority in labor disputes, the Railway Labor Act, 45 U.S.C.A. § 151 et seq. (hereinafter "the Act"). In particular, this is an action to vacate the orders, rulings, and directions of election, entered on June 21, 1961, July 20, 1961, and July 21, 1961 by the Board, denying members of Plaintiff the opportunity to vote in said election, determining that the Second Officers' Association is qualified under the Act to participate in an election among the class or craft of flight engineers employed by Western Air Lines (hereinafter "Western"), and permitting employees of Western to vote who were hired in violation of the Act. The Plaintiff also seeks injunctive relief against the Board restraining and enjoining it from denying Plaintiff due process of law and from acting in an unlawful, arbitrary and capricious manner, and for a declaratory judgment and for other relief.

2. The jurisdiction of this court is founded upon 28 U.S.C.A. § 1337, vesting jurisdiction in this court of an action or proceeding arising under an act of Congress regulating commerce, upon 28 U.S.C.A. § 1331, upon the Railway Labor Act, 45 U.S.C.A. § 151 et seq., upon the Administrative Procedures Act, 5 U.S.C.A. § 1009 et seq., and upon the Declaratory Judgments Act, 28 U.S.C.A. § 2201 et seq. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs.

3. Plaintiff, WES Chapter, Flight Engineers' International Association—AFL-CIO (hereinafter sometimes referred to as "the Association") is an unincorporated voluntary labor organization, designated and authorized under the Act as the collective bargaining representative of all employees of Western in the class or craft of flight engineers.

4. Defendant Board is an agency of the United States Government, created and governed solely by the Act. Its members are the individual Defendants Leverett Edwards who is Chairman, Francis J. O'Neill, Jr. and Robert O. Boyd. Said individual Defendants collectively constitute "the Board." The offices of each and all these Defendants are located, and they are each and all to be found, within the District of Columbia.

5. Western Air Lines, Inc. (hereinafter "Western") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business at 6060 Avion Drive, Los Angeles, California. Western is an air carrier engaging in the transportation by air of passengers, property, and mail in and between twelve (12) western states and Canada and Mexico, pursuant to Certificates of Public Convenience and Necessity issued by the United States Civil Aeronautics Board.

6. Plaintiff was certificated by the Board in Case No. R-3209 on October 22, 1957 as the representative of the class or craft of "flight engineers" employed by Western. Plaintiff has at all times since then been recognized by Western as the representative of its flight engineers and has from time to time entered into collective bargaining agreements with Plaintiff covering said flight engineers. On April 11, 1958 Plaintiff and Western entered into a collective bargaining agreement establishing rates of pay, rules and working conditions of flight engineers employed by Western. On April 11, 1958, Plaintiff and Western also entered into an agreement establishing a Western Air Lines Flight Engineers' System Board of Adjustment (hereinafter "System Board"), pursuant to and in compliance with specifically Section 204 of the Act, 45 U.S.C.A. § 184. By their terms both of these agreements were to continue in full force and effect until January 1, 1961, and to be subject to change as provided for in Section 6 of the Act, 45 U.S.C.A. § 156.

7. The collective bargaining agreement is now and at all times since January 1, 1961, has been in full force and

effect as a result of a notice of change given by Plaintiff on November 28, 1960, pursuant to Section 6 of the Act. Neither Plaintiff nor Western has reopened the System Board agreement and it remains in full force and effect.

8. The collective bargaining agreement contains provisions for the making and handling of grievances, and the agreement establishing the System Board declares, as provided in the Act, that the System Board shall have jurisdiction over disputes growing out of grievances or out of interpretation or application of any of the terms of the collective bargaining agreement.

9. On February 17, 1961, flight engineers employed by many of the certificated air carriers, including Western, walked off their jobs. As a result of the mediatory efforts of the Secretary of Labor and the Executive offices of the President of the United States, the flight engineers entered into a back-to-work agreement and the walkout terminated on February 23, 1961. The back-to-work agreement was entered into between the flight engineers and all of the affected carriers other than Western who refused to be a party to the back-to-work agreement. The back-to-work agreement provided that in return for a promise by the flight engineers to return to work, each carrier would terminate all company disciplinary action and all legal actions against the flight engineers. At the same time, the President of the United States by Executive Order No. 10921 established a commission to study the issues out of which the walk-out occurred. Presidential Executive Order No. 10922 amended No. 10921 to include Western within the jurisdiction of the commission.

10. Between February 19 and February 23, 1961, Western fired each and all of its flight engineers represented by Plaintiff. On or about February 23, 1961, Western refused the unconditional offer of the flight engineers to resume their duties as flight engineers which offers were made pursuant to the back-to-work agreement and Presidential Executive Order 10922. Prior to and subsequent to said offers to return to work, Western had employed individuals

classified as "second officers" in the place and stead of said discharged flight engineers.

11. Plaintiff is informed and believes and therefore states as a fact, that said "second officers" are performing the same duties as were performed by the flight engineers, but that the wages, hours and conditions of employment of said "second officers" have not been in accordance with Western's collective bargaining agreement with Plaintiff. On April 7, 1961, Western submitted to the System Board (described in paragraphs 6, 7 and 8 *supra*) the question whether said "second officers" are employed in compliance with said collective bargaining agreement.

12. On or about April 5, 1961, the Second Officers' Association, (hereinafter "SOA") an unincorporated association consisting of said replacement "second officers," made application to the Board for an election under Section 2, Ninth of the Act, alleged a dispute existed among the flight engineers employed by Western and sought to represent said employees for collective bargaining purposes. On April 12, 1961, the Board notified Plaintiff that SOA had applied to be certificated as the representatives of flight engineers employed by Western. A copy of said notification is attached hereto as Exhibit 1.

13. On April 17, 1961, Plaintiff replied to said application of SOA and alleged *inter alia* upon information and belief that SOA was an organization illegally assisted by Western in violation of Section 2, Third and Section 2, Fourth of the Railway Labor Act, and requested a public hearing on this question. The Board, after docketing the application of SOA as Case No. R-3483 on April 21, 1961, notified Plaintiff that a "public hearing" would be held. This NOTICE OF HEARING is attached hereto as Exhibit 2.

14. On May 17, 1961, in a letter to the Board, Plaintiff requested the Board, pursuant to the terms of the last sentence of Section 2, Ninth of the Act, to see to it that there was present at said public hearing Mr. T. S. Shrader, Director of Labor Relations, Western Air Lines, and Messrs. Bruggemeyer, Avery and Beckstead, President,

Vice President and Secretary of SOA, respectively. Plaintiff also requested that certain described documents, which would show the unlawful conspiracy between Western and SOA, be made available to Plaintiff at said public hearing. In the alternative, Plaintiff requested that the Board issue subpoenas, in accordance with Section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1005(c), requiring the presence of the above-named persons and the production of the described documents so that the Board would have before it all facts essential to a determination on the merits of Plaintiff's allegations. This letter to the Board is attached hereto as Exhibit 3.

15. The Board, in a letter dated May 22, 1961, in complete abdication of its responsibility of Section 2, Ninth of the Railway Labor Act, notified Plaintiff that Plaintiff would have the burden of presenting evidence in support of its allegation of illegal assistance, and the Board refused the requests of Plaintiff described in paragraph 14, *supra*, which if complied with would have permitted Plaintiff to establish the unlawful assistance by Western. The letter of the Board is attached hereto as Exhibit 4. Thereupon Plaintiff requested Messrs. Shrader and Bruggemeyer to personally appear at the hearing and produce the requested witnesses and documents. These requests were also refused. As a result of the refusal by the Board to honor the requests of Plaintiff, and as a result of the refusals by Messrs. Shrader and Bruggemeyer, the burden imposed upon Plaintiff by the Board was improper and arbitrary.

16. The only witnesses made available to Plaintiff at the "hearing" which was held on May 26, 1961, in Los Angeles, Calif., were Messrs. Beckstead and Dent, Secretary and Treasurer of SOA respectively. When questioned by Plaintiff at the "hearing," Messrs. Beckstead and Dent did not deny the existence of facts, documents, meetings and discussions which would have, if their existence had been made known to the Board, established Western's unlawful assistance. On the contrary, both Messrs. Beckstead and Dent claimed that they were without sufficient know-

ledge and information upon which to answer the questions. Messrs. Shrader, Bruggemeyer, and Avery, who, as related in paragraphs 14 and 15, supra, were requested to appear, and who were the only persons with personal knowledge and information of the unlawful assistance, were not present at the "hearing." As a matter of law, therefore, Plaintiff was denied an opportunity to present evidence of the illegal assistance and consequently was denied a hearing by the Board despite the fact that the Board had ordered one to be afforded Plaintiff. As a matter of law, these denials constitute a deprivation of due process to Plaintiff.

17. The Board, on June 21, 1961, issued its FINDINGS UPON INVESTIGATION in Case No. R-3483 in which it found, without referring to the fact that Plaintiff had been denied access to documents and witnesses, that the allegations of Plaintiff of illegal assistance by Western were not substantiated. This FINDINGS is attached hereto as Exhibit 5.

18. On June 22, 1961, the Board, in reply to a request by Plaintiff for an extension of time in which to present Plaintiff's position with respect to the eligibility lists to be used in the conduct of the representation, denied the request of Plaintiff and stated that any question on eligibility should be presented *to the mediator* assigned by the Board to investigate the application of SOA.

19. On July 5, 1961, Plaintiff was notified by the mediator that he was without authority to act on Plaintiff's contentions with respect to the eligibility list, that only flight engineers presently employed by Western were eligible and would be permitted to vote in the representation election requested by SOA, that members of Plaintiff who had been discharged, as related in paragraph 10 *supra*, were not eligible to vote and would not be permitted to do so. Thereupon the Board, in response to a telegram from Plaintiff, notified Plaintiff that only *the Board, and not the mediator*, could dispose of Plaintiff's contentions with respect to the eligibility list.

20. Plaintiff, in a letter dated July 8, 1961, formally requested the Board to declare said discharged flight engineers as eligible to vote in any election to be held among the flight engineers on Western upon the application filed by SOA. Plaintiff notified the Board that the refusal by the mediator to declare said discharged members of Plaintiff eligible to vote was in direct conflict with, and in contravention of, the express provisions of Rule 6 of the Board's Rules and Regulations, 29 C.F.R. § 1206.6. Rule 6 specifically provides in pertinent part:

> "*Eligibility of dismissed employees to vote.* Dismissed employees whose requests for reinstatement account of wrongful dismissal *are pending before proper authorities*, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal." (Emphasis added)

Plaintiff informed the Board that the issues of the reinstatement of the discharged Western flight engineers was pending before at least three "proper authorities," namely: (1) a System Board of Adjustment, in accordance with terms of the collective bargaining agreement described in paragraph 8, *supra*; (2) a United States District Court, Southern District of California, in Civil Action No. 510-61-PH; (3) and the President's "Commission on the Airlines Controversy" established under Executive Orders 10921 and 10922, as related in paragraph 9, *supra*. This letter, with attachments, is attached hereto as Exhibit 6.

21. On July 20, 1961, Plaintiff received a telegram from the Board in reply to Plaintiff's letter described in paragraph 19, *supra*. The Board informed Plaintiff in said telegram that it had determined Plaintiff's objections set forth in said letter to be "without merit under the Board's rules and that no sufficient cause has been presented under such rules for additional delay of the election" in Case No. R-3483. Said telegram further informed Plaintiff that the election would be conducted by sending mail ballots to

only those flight engineers "currently employed by Western." This telegram is attached hereto as Exhibit 7.

22. On July 21, 1961 the Board, by Mediator Wyatt, issued a formal NOTICE OF ELECTION to be held under the Railway Labor Act involving flight engineers. The NOTICE OF ELECTION provided that only employees appearing on the payrolls of Western on July 15, 1961 would be eligible to vote in this election. The ballots are returnable to the mediator in Alexandria, Virginia on August 7, 1961.

23. The aforesaid orders of the Board determining that the flight engineers who were discharged by Western, but whose reinstatements are now pending before several proper authorities, are in direct violation of the Rules and Regulations of the Board and in direct violation of the Railway Labor Act which guarantees to these individual members the right to be represented by a representative of their own choosing. The aforesaid orders of the Board determining that SOA may properly appear on the ballot and represent flight engineers employed by Western denied Plaintiff due process of law in violation of the Fifth Amendment of the Constitution of the United States insofar as said orders were based upon the purported "hearing" on the issues raised by Plaintiff of Western's illegal assistance to SOA.

24. Plaintiff, and each individual flight engineer represented by said Plaintiff, will suffer irreparable injury unless this court enjoins the National Mediation Board from conducting the aforesaid election, counting ballots, and certifying any representative of flight engineers employed by Western other than the Plaintiff. There is no remedy available other than the relief sought herein. Unless such relief be granted by this Court, the rights of Plaintiff to represent the Western flight engineers, the rights of its membership to be represented by Plaintiff, and rights of property and status of great value enforceable under the Railway Labor Act and Constitution will be irreparably damaged and destroyed in violation of the Act and the

Constitution. Money damages can never compensate for the loss of these rights and status.

WHEREFORE, Plaintiff respectfully requests the Court to enter an order:

1. Enjoining and restraining, pending the final disposition of this cause, and permanently, Defendants National Mediation Board, its Chairman and members, and its agents, from conducting any election, counting ballots, or certifying a representative among the class or craft of flight engineers on Western;

2. Impounding the ballots, if said election has already been started, before they are opened and counted;

3. Staying or suspending, if said ballots have already been counted, any certification until the final and effective judicial determination of whether the discharged flight engineers are eligible to participate in said election, and whether SOA may properly participate in such election and represent the class or craft of flight engineers employed by Western;

4. Setting aside and vacating the orders of the National Mediation Board entered in Case No. R-3483 on June 21, 1961, July 20, 1961, and July 21, 1961, and declaring that the Railway Labor Act does not confer jurisdiction or authority upon the Board to certify the SOA as the representative of the craft or class of flight engineers employed by Western;

5. Providing such other and further relief, orders and decrees as shall in the premises seem meet and just and equitable to this Court.

ZIMRING, GROMFINE AND STERNSTEIN
1001 Connecticut Avenue
Washington, D. C.

By: (s) HERMAN STERNSTEIN
(s) WILLIAM B. PEER
*Attorneys for Plaintiff*

August 3, 1961.

## AFFIDAVIT

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

ARNE L. ANDERSON, being first duly sworn according to law, deposes and says that he is the President of WES Chapter, Flight Engineers' International Association, AFL-CIO, Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof; and that the allegations of fact therein are true to his knowledge, except as to those stated on information and belief, and that as to those, he believes them to be true.

(s) ARNE L. ANDERSON

SUBSCRIBED AND SWORN to before me this 1st day of August, 1961.

(s) LOU H. GREEN

Notary Public in and for said county and state.
My Commission expires June 24, 1965

## APPENDIX C

**(Complaint, Exhibit 5)**

NATIONAL MEDIATION BOARD
WASHINGTON

| | |
|---|---|
| In the Matter of the Application of THE SECOND OFFICERS' ASSOCIATION alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act involving employees of WESTERN AIR LINES, INC. | CASE NO. R-3483<br>FINDINGS UPON INVESTIGATION<br>June 21, 1961 |

On or about April 5, 1961, The Second Officers' Association, an unincorporated association, made application to the National Mediation Board for an election under Section 2, Ninth, of the Railway Labor Act, and alleging a dispute existing among the employees of Western Air Lines, Inc., known as Flight Engineers, as to who should represent such employees for collective bargaining purposes. After a preliminary investigation, the application was docked as NMB Case No. R-3483. At that time the employees involved were represented by the Flight Engineers' International Association, AFL-CIO, under a certificate issued in Case R-3209 on October 22, 1957.

On or about April 17, 1961, the FEIA, by their counsel Zimring, Gromfine and Sternstein, filed charges with the Board alleging that The Second Officers' Association had been illegally assisted by the carrier (Western Air Lines, Inc.) and that the authorization cards obtained by the Association were solicited with the assistance of the Carrier, all in violation of the Railway Labor Act. The FEIA requested that a public hearing be held during the investigation of the dispute. On May 17, 1961, the Board gave notice of a hearing to be held in Los Angeles, California, on May 26, 1961, and in accordance with such notice a public hearing was held in Los Angeles before Member

Robert O. Boyd. At the hearing the FEIA and The Second Officers' Association were represented by counsel. A representative of the carrier was also present by invitation of the Board.

The issue raised by the charges made by FEIA was whether or not interference by the Carrier was such as to prevent a free and unfettered choice of a representative in any election that might be held among the Flight Engineers.

The Board has carefully reviewed the transcript of the hearing and has also examined photostatic copies of the minutes of the several meetings of The Second Officers' Association, as well as a copy of their proposed Constitution and By-Laws. It is not necessary here to review the testimony presented at the hearing. It is sufficient to say that no fact was established from which even an inference—to say nothing of a conclusion—can be drawn supporting either of the charges made by FEIA.

The Board, therefore, directs that the investigation of the disputed alleged in the application of The Second Officers' Asociation be progressed to a conclusion under the rules and practices of the Board.

By direction of the NATIONAL MEDIATION BOARD.

(s) E. C. THOMPSON
*Executive Secretary*

## APPENDIX D

**(Complaint, Exhibit 7)**

WESTERN UNION
TELEGRAM

1961 JUL 20 AM 11 19

TXA032 WA 181

(TM) LONG PD FAX WASHINGTON DC 20 1015A EDT
I J GROMFINE, ZIMRING GROMFINE & STERNSTEIN
1001 CONNECTICUT AV NORTHWEST WASHDC

THE NATIONAL MEDIATION BOARD HAS FULLY CONSIDERED ALL OF THE OBJECTIONS PRESENTED OR ASSERTED BY YOU IN CONNECTION WITH NMB CASE NO.; 4-3483 AND FINDS THEY ARE WITHOUT MERIT UNDER THE BOARD'S RULES AND THAT NO SUFFICIENT CAUSE HAS BEEN PRESENTED UNDER SUCH RULES FOR ADDITIONAL DELAY OF THE ELECTION IN THIS CASE. ALL OF SAID OBJECTIONS AND REQUESTS BASED THEREON ARE ACCORDINGLY OVERRULED. THE BOARD IS ALSO OF THE OPINION THAT NO FURTHER HEARING OR ARGUMENT IS NECESSARY OR JUSTIFIED UNDER THE SHOWING MADE AND REQUEST FOR SAME IS DENIED. ON BASIS OF MEDIATOR'S REPORT OF HIS CHECK OF AUTHORIZATIONS, THE BOARD HAS FOUND THAT A REPRESENTATION DISPUTE EXISTS AMONG FLIGHT ENGINEERS CURRENTLY EMPLOYED BY WESTERN AIR LINES, INC., AND DIRECTS THAT A MAIL BALLOT ELECTION BE CONDUCTED AMONG THESE EMPLOYEES FORTHWITH, USING ELIGIBLE LIST PREPARED BY THE MEDIATOR.

BY ORDER OF THE NATIONAL MEDIATION BOARD

E C THOMPSON EXEC SEC'TY NATIONAL MEDIATION BOARD

## APPENDIX E

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Constitution of the United States, Amendment V:*

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

*Railway Labor Act, 45 U. S. C. § 151 et seq.:*
*Section 2, Third, 45 U. S. C. § 152, Third:*

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

*Section 2, Fourth, 45 U. S. C. § 152, Fourth:*

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or

to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

*Section 2, Ninth, 45 U. S. C. § 152, Ninth:*

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

...RARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 8 1961
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961
No. 540

WEST CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner,*

*vs.*

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

## BRIEF FOR RESPONDENT WESTERN AIR LINES, INC. IN OPPOSITION.

L. WELCH POGUE,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.,
HUGH W. DARLING,
DONALD K. HALL,
523 West Sixth Street, Suite 737,
Los Angeles 14, California,
*Attorneys for Respondent Western Air Lines, Inc.*

*Of Counsel:*
POGUE & NEAL,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.,
DARLING, SHATTUCK & EDMONDS,
523 West Sixth Street, Suite 737,
Los Angeles 14, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

*Petitioner,*

*vs.*

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.**

## BRIEF FOR RESPONDENT WESTERN AIR LINES, INC. IN OPPOSITION.

### Opinions Below.

There was no written opinion in the District Court. The findings of fact and conclusions of law of the District Court on petitioner's motion for preliminary injunction and the District Court's order denying the mo-

tion are printed in Appendices I and II to this Brief. The order of the District Court, appealed by petitioner, granting respondents' motion for summary judgment, denying petitioner's motion for summary judgment and dismissing the complaint is printed in Appendix A to the Petition.

Petitioner seeks a writ of certiorari in this case before judgment in the Court of Appeals.[1]

## Jurisdiction.

The decision of the District Court was entered on October 18, 1961. Petitioner's appeal was docketed by the filing of the original record in the Court of Appeals on October 25, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## Questions Presented.

1. Whether representation proceedings under Section 2, Ninth of the Railway Labor Act, 45 U. S. C. §152, Ninth are reviewable because the National Mediation Board denied voting rights to discharged employees claiming eligibility under a rule of the Board.

2. Whether representation proceedings under Section 2, Ninth of the Railway Labor Act, 45 U. S. C. §152, Ninth are reviewable because the National Mediation

---

[1]Western's objections to transmittal of the record to this court before judgment in the Court of Appeals were that normal appellate processes should be followed, that no "imperative" public interest would be served by deviating therefrom and that the pendency in this Court of a petition for writ of certiorari in *UNA Chapter, Flight Engineers' International Association, AFL-CIO v. National Mediation Board, et al.*, No. 531, October Term, 1961, did not justify such deviation. *Cf.* Petition, p. 2.

Board, although it was not required to do so under the Act or the Board's regulations, called a hearing on a rival union's charge that the applicant union had been illegally assisted by the carrier and, in connection therewith, refused to require the applicant union and the carrier to produce certain allegedly essential witnesses.

**Statute and Administrative Rules Involved.**

The statute involved is the Railway Labor Act, 44 Stat. 577, 48 Stat. 1186, 49 Stat. 1189, 45 U. S. C. §§151, *et seq.* The pertinent statutory provision is Section 2, Ninth of the Act, 48 Stat. 1188, 45 U. S. C. §152, Ninth:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives

*Rules of National Mediation Board, Rule 6, 29 C. F. R. § 1206.6:*

"*Eligibility of dismissed employees to vote.* Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Appendix III to this Brief sets out other relevant provisions of the Act and the Board rules involved.

## Statement.

### A. The Walkout.

On February 17, 1961, the flight engineers in the employ of respondent Western Air Lines, Inc. ("Western"), represented by petitioner, without notice or warning in concert refused to accept work assignments. Western's operations were brought to a standstill, stranding thousands of air travellers on its system. Simultaneous flight engineer walkouts occurred across the nation on American Airlines, Eastern Air Lines, The Flying Tiger Line, National Airlines, Pan American World Airways and Trans World Airlines.

The walkout was not the result of any jurisdictional or other labor dispute with or involving Western, or any of the other carriers.

On February 18, 1961, the United States District Court for the Southern District of California issued a temporary restraining order enjoining the walkout and strike against Western.[2] The restraining order was served the same day and each of petitioner's members was notified. The order was ignored.

Western attempted to continue to operate. Each flight engineer was personally requested to return to work. On refusal, employment was terminated and the employee was so notified.[3]

On February 20, 1961, Western dismissed the action in which the temporary restraining order had issued and commenced the hiring and training of replacement flight engineers.

On February 21, 1961, Secretary of Labor Arthur J. Goldberg issued a press release stating that he had investigated the flight engineer walkouts on American Airlines, Eastern Air Lines, The Flying Tiger Line, National Airlines, Pan American World Airways and Trans World Airlines, that he had conferred with representatives of those carriers and with representatives of the unions involved and that he had obtained the "assurance" of the carriers that no disciplinary action would be taken against the strikers if they returned to work.

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[2]*Western Air Lines, Inc. v. Flight Engineers International Association, et al.*, U. S. D. C., S. D. Cal., Civil Action No. 178-61-HW.

[3]Most of the terminations occurred in the first four days of the walkout. Flight engineers on vacation, sick leave or other authorized absences were terminated at the time they were scheduled to return to work and refused to do so upon individual request.

On the same date Executive Order 10921, 26 F. R. 1553, was issued, establishing an advisory commission to inquire into the controversy as it affected the carriers named in the Secretary of Labor's press release and to report to the President.

On February 23, 1961, Executive Order 10922, 26 F. R. 1655, was issued amending Executive Order 10921 to include Western among the named air carriers, without Western's consent and without any commitment or assurance on its part to reconsider the discharges.

**B. The Election.**

On April 6, 1961, the Second Officers' Association ("SOA"), a labor organization composed of flight engineers employed by Western, commenced the Board proceedings giving rise to this case, by the filing of an application for certification under Section 2, Ninth as the authorized representative of Western's flight engineers.

Petitioner filed allegations that SOA had been illegally assisted by Western in violation of the Act. On May 26, 1961, a public hearing was held on the charge in Los Angeles, California, before respondent Robert O. Boyd, Member of the Board. In advance of the hearing petitioner had requested the Board to require Western and SOA to produce certain witnesses and alleged documents at the hearing. The Board had advised petitioner that it had no powers of subpoena or compulsory process.

Testimony and documentary evidence were adduced at the hearing. The Secretary and the Treasurer of SOA voluntarily appeared and were examined by petitioner's counsel. A representative of Western was present as requested by the Board. SOA's minutes and records were produced for the Board's inspection alone, which procedure was agreed to by petitioner's counsel. Western's representative invited the Board to inspect Western's records.

On June 21, 1961, the Board issued Findings Upon Investigation (Appendix C to the Petition) concluding that the charge of illegal assistance had not been substantiated and directing that investigation of the representation dispute proceed.

Petitioner then urged that if an election were held Board Rule 6, 29 CFR §1200.6, required that the discharge flight engineers be permitted to vote. The contention was predicated on a "group grievance" for reinstatement filed with Western on June 23, 1961, and rejected by Western on June 26, 1961, the alleged pendency of the grievance before the System Board of Adjustment (although Western's rejection of the grievance had not been appealed to the System Board), two counterclaims filed on July 5, 1961, against Western in the United States District Court for the Southern District of California and the pendency of the Presidential investigation.[4]

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[4]See footnote 8, *infra*, as to these allegations.

On July 19, 1961, the Board advised petitioner that the election would be conducted among the flight engineers then employed by Western.

Ballots were mailed with a return date of August 7, 1961. After deferral because of proceedings in this case, the ballots were counted on September 1, 1961.[5]

On September 5, 1961, the Board certified SOA as the duly designated and authorized representative of the flight engineers employed by Western.

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[5]Of the 104 employees on the eligibility list, 93 returned ballots—88 voted for SOA, 1 voted for petitioner and 2 voted for other representatives; two ballots were voided. While the number of discharged flight engineers was 123, petitioner has made no showing that all would have been eligible to vote under other applicable rules of the Board, *e.g.*, the rule that furloughed employees working for another carrier subject to the Railway Labor Act are not eligible to participate in an election among employees of the carrier from which they were furloughed. The affidavit of S. R. Shatto, Vice President-Operations of Western, referred to in the Petition, pp. 7-8, attested to the number discharged, not to the number that might have been eligible to vote.

## ARGUMENT.

### I.

### There Is No Justification for Consideration of This Case Before Judgment in the Court of Appeals.

Petitioner offers no argument or showing that this case is "of such imperative public importance as to justify . . . deviation from normal appellate processes and to require immediate settlement" in this Court before judgment in the Court of Appeals. Rule 20, 28 U. S. C. A.

Petitioner's ground for skipping the Court of Appeals is that this case—see Petition, pages 8, 13—"amplifies," "illuminates" and "clarifies" the issues in *UNA Chapter, Flight Engineers' International Association v. National Mediation Board*, No. 531, October Term, 1961, in which application for certiorari is pending after judgment in the Court of Appeals.

It is neither contended nor shown that identical or closely related issues are posed in the two cases. The cases have no affinity other than the fact that the same statute is involved and in each case the District Court held that the issues presented were not justiciable. Normal appellate processes should be followed in this case.

### II.

### The Decision of the District Court Is Not in Conflict With Applicable Decisions of This Court.

This is a clear case for application of *Switchmen's Union v. National Mediation Board*, 320 U. S. 297. Constitutional issues aside, actions of the National Me-

diation Board under Section 2, Ninth of the Railway Labor Act are not reviewable. The District Court's decision that *Switchmen's Union* governs this case is correct.

Petitioner contends that the District Court's decision "flatly" contradicts *Leedom v. Kyne*, 358 U. S. 184, and *Accardi v. Shaughnessy*, 347 U. S. 260.

The "sole and *narrow* question" in *Leedom* was "whether a Federal District Court has jurisdiction of an original suit to vacate . . . [a] determination of the [National Labor Relations] Board because made *in excess of its powers.*" 358 U. S., at 185.[6] "This suit is not one to 'review,' . . . a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made *in excess of its delegated powers and contrary to a specific prohibition in the Act.*" *Id.*, at 188. Petitioner's contentions rest on a rule of the Board, not a statutory prohibition in the Act. *Leedom* is not in point.

*Accardi*, on the other hand, holds that self-imposed *procedural* regulations must be scrupulously observed in hearings held by government administrators and agencies, even when the administrative action in question is discretionary in nature. The *Accardi* rule is confirmed in *Service v. Dulles*, 354 U. S. 363, and *Vitarelli v. Seaton*, 359 U. S. 535. "He that takes the procedural sword shall perish by that sword." 359 U. S., at 547. There was no departure from that principle here.

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[6]Emphasis in quoted material added throughout unless otherwise noted.

Petitioner relies on Rule 6 of the Board, 29 CFR §1206.6, which reads:

> "Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

Rule 6 does not regulate *procedures* of the Board in *hearings* held by it. The Rule states a discretionary policy regarding voting rights in elections. Its meaning and application are for the Board to determine.[7] *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 305.

The statute involved in *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, provides for judicial review of the Commission's orders. The question there decided was whether a Commission order based on "broad equitable principles" established by judicial decision could be supported by determinations which the Commission might have made within its special competence. It was held that the order had to be judged on the professed grounds, not by what the Commission might have done. That case has no bearing here.

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[7]Rule 7 of the Board, 29 CFR § 1206.7, reads:

"These Rules and Regulations shall be liberally construed to effectuate the purposes and provisions of the Act."

The Board's refusal to apply Rule 6 in this case was within its discretionary jurisdiction.[8]

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[8]This is underscored by the fact that at the time the Board made its determination not to allow the discharged employees a vote it had at hand, among other information (all of which is of record herein):

1. The finding of the United States District Court for the Southern District of California that the discharged employees had "simply quit their jobs" (Appendix I, *infra*, Finding 12).

2. A transcript of court proceedings between petitioner and Western subsequent to the strike, in the course of which counsel for petitioner stated:

> "I don't see any basis for them [the discharged employees] to say, we can refuse to take an assigned job, but you can't fire us over it . . . these men misconducted themselves and can't get their jobs back, in my opinion."

3. The May 24, 1961, report submitted to the President by the commission established by Executive Order 10921, in which it disclaimed any power to pass on the legal propriety of the Western discharges.

4. A decision of the Director of the Civil Aeronautics Board's Bureau of Enforcement in CAB Docket 12223 refusing to institute enforcement proceedings against Western on petitioner's complaint that Western had violated the Federal Aviation Act, 49 U. S. C. §§ 1301, *et seq.*, by refusing to reinstate the discharged employees.

5. The counterclaims filed by petitioner in *Western Air Lines, Inc. v. Flight Engineers International Association, AFL-CIO, et al.*, U. S. D. C., S. D. Cal., Civil Action No. 510-61-PH, praying that an injunction be issued requiring Western to reinstate the discharged employees on the ground that Western had violated the Railway Labor Act by conspiring with the Air Line Pilots Association, International, to substitute that union for petitioner as the representative of Western's flight engineers and by refusing to entertain the pretexted group grievance.

6. The full details of the alleged grievance showing that the discharged employees had no requests for reinstatement pending before "proper authorities" within the meaning of the Act and Rule 6. The Act in Section 3, First (i), 45 U. S. C. § 153, First (i) and Title II, Section 204, 45 U. S. C. § 184, prescribes the proper authorities for the handling of grievances, namely, operating officers of the carrier up to and including the chief operating officer designated to handle such disputes (as in the Board cases cited in the Petition, p. 10n) and the National Railroad Adjustment Board or appropriate System Board of

## III.

## No Substantial Due Process Issue Is Presented.

Proceedings under Section 2, Ninth involve "mediation, *not adjudication*—mediation being 'the antithesis of justiciability.' 320 U. S., at 337." *Union Pacific R. Co. v. Price*, 360 U. S. 601, 619n. ". . . [T]here is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate." *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 304. "The function of the Board under § 2, Ninth is more the function of a referee." *Id*, at 304. ". . . Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease." *Id.*, at 305.

The Board has no rules or regulations governing the procedures to be followed in hearings that it may call. *Cf. Accardi v. Shaughnessy*, 347 U. S. 260. Such hearings as the Board may hold are advisory in nature and are not binding on the Board in reaching its ultimate determination under Section 2, Ninth.

Petitioner was afforded full opportunity to present whatever evidence it had to support its allegations that SOA had been illegally assisted. *Cf. Order of Railway*

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Adjustment. *Railroad Trainmen v. Chicago River & I. R.R. Co.*, 353 U. S. 30. The grievance on its face was untimely and without right under the collective bargaining agreement, and its rejection by Western had not been appealed to, and was not pending before, the System Board of Adjustment. See *Atlantic Coast Line R. Co. v. Pope*, 119 F. 2d 39 (4 Cir.); *Peoples v. Southern Pacific Co.*, 232 F. 2d 707 (9 Cir.); *Crusen v. United Air Lines*, 239 F. 2d 803 (10 Cir.); *Hooser v. Baltimore & Ohio R. Co.*, 279 F. 2d 197 (7 Cir.).

*Conductors v. Pennsylvania R. Co.*, 323 U. S. 166. Due process requires no more.

Moreover, Section 2, Ninth contains no command that the Board determine, much less adjudicate, compliance or lack of compliance with Sections 2, Third and Fourth. The prohibitions of Sections 2, Third and Fourth, pertinent to petitioner's accusation, are on the carrier. The carrier is not a party to proceedings under Section 2, Ninth. The Act in Section 2, Tenth, 45 U. S. C. §152, Tenth, prescribes criminal penalties for violations of Sections 2, Third and Fourth by a carrier.[9] ". . . Congress intended to go no further in its use of the processes of adjudication and litigation than the *express provisions* of the Act indicate." *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 302.

The Board's determination is nonetheless final by reason of petitioner's claim of violation of Sections 2, Third and Fourth. Section 2, Ninth permits of no distinction which would subject to judicial review this particular aspect of the problem, assuming the Board is required to consider it at all.

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[9]Petitioner has filed a complaint with the United States Attorney, Los Angeles, California, alleging that Western unlawfully assisted SOA in violation of Section 2, Fourth and requesting investigation and institution of criminal proceedings under Section 2, Tenth.

## Conclusion.

The petition for a writ of certiorari in this case should be denied.

December 6, 1961.

Respectfully submitted,

L. Welch Pogue,
1001 Connecticut Avenue, N. W.
Washington 6, D. C.,

Hugh W. Darling,
Donald K. Hall,
523 West Sixth Street, Suite 737,
Los Angeles 14, California,

*Attorneys for Respondent*
*Western Air Lines, Inc.*

*Of Counsel:*

Pogue & Neal,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.

Darling, Shattuck & Edmonds,
523 West Sixth Street, Suite 737,
Los Angeles 14, California.

## APPENDIX I.

### Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wes Chapter, Flight Engineers' International Association—AFL-CIO, 4013 Don Tomaso Drive, Los Angeles, California, Plaintiff, v. National Mediation Board, Leverett Edwards, Individually and as Chairman of the National Mediation Board, Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board, Robert O. Boyd, Individually and as Member of the National Mediation Board, 1230 Sixteenth St., N. W. Washington 6, D. C., Defendants. Civil Action No. 2509-61.

This cause came on for hearing in open Court on plaintiff's Motion For Preliminary Injunction and defendants' Opposition thereto. Upon consideration of the said Motion and Opposition and of the complaint, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motion, and after hearing oral argument, the Court on this 25th day of August, 1961, makes the following findings of fact and conclusions of law:

*Findings of Fact*

1. On April 6, 1961, the National Mediation Board received a telegraphic application from the Second Officers Association for the Board's services under Section 2, Ninth of the Railway Labor Act (45 U. S. C. §152) for investigation of a representation dispute alleged to exist among the employees of Western Air Lines, Inc., employed as Flight Engineers. At that

time the Flight Engineers' International Association held a certification to represent these employees under National Mediation Board Case No. R-3209 certification dated October 22, 1957.

2. When notified by the Board of the receipt of this application, the Flight Engineers' International Association (hereinafter referred to as FEIA) in a letter dated April 17, 1961, made various allegations, including the following:

> "(1) Wes Chapter F.E.I.A. avers, upon information and belief, that the said 'Second Officers Association' is an organization illegally assisted by the carrier in violation of the provisions of the Railway Labor Act. We respectfully request that the Board conduct an investigation into the carrier's assistance, and hold a public hearing as part of such investigation.
>
> "(2) Wes Chapter F.E.I.A. avers, upon information and belief, that the authorizations relied on by the said 'Second Officers Association' were solicited with the assistance of the carrier in violation of the Act."

3. The application of the Second Officers Association was considered by the Board in executive session on April 20, 1961, and the Board directed that it be docketed for investigation as NMB Case No. R-3483. Western Air Lines, Inc., the Second Officers Association, and the attorney for the FEIA were so notified in a letter of the Board dated April 21, 1961.

4. On May 1, 1961, the attorney for the FEIA was notified by letter, copies of which were sent to Western Air Lines, Inc., and the Second Officers Association, that after consideration of the FEIA letter

of April 17, 1961, the Board would hold a hearing on item 1 in that letter (quoted above in paragraph 2). A Notice of Hearing dated May 17, 1961, set the date of the hearing for May 26, 1961, in Los Angeles, California.

5. On May 17, 1961, the FEIA wrote the Board requesting the latter to arrange for the presentation of documents, information and the presence of certain individuals at the hearing to be conducted on May 26, 1961. Replying by letter dated May 22, 1961, the Board outlined its policy in respect to hearings in representation proceedings under Section 2, Ninth of the Railway Labor Act. As stated in the letter, the Board has no power to issue subpoenas or to compel the attendance of witnesses or submission of evidence. It is the obligation of the party requesting such a hearing to produce evidence to substantiate its allegations.

6. Following the hearing, the Board on June 21, 1961, issued its Findings Upon Investigation in which it found that no fact was established at the hearing from which even an inference, let alone a conclusion, could be drawn supporting either of the charges made by FEIA, as quoted in paragraph 2 above. The Board, therefore, directed that the investigation of the dispute alleged in the application of the Second Officers Association be progressed to a conclusion under the rules and practices of the Board.

7. The Board set the case for handling by Mediator Luther G. Wyatt to commence in Los Angeles, California, on June 23, 1961, and all parties at interest were advised accordingly. At the request of the FEIA, the Board postponed that portion of the handling of

the case requiring the presence of party representatives from June 23, 1961 to July 5, 1961.

8. On June 22, 1961, the Board telegraphed the officers and attorney of the FEIA advising that the Mediator's initial investigation would proceed as scheduled, and any questions on eligibility or other issues could be presented to the Mediator when such investigation had been completed. The initial investigation, which consists of securing lists of employees from the carrier and checking authorization cards against such list, does not require the presence of representatives of the parties. The Mediator completed his initial investigation and so reported to the Board on June 29, 1961. On June 30, 1961 the Board telegraphed the parties to this dispute that the Mediator's initial investigation had been completed, setting the date of July 5, 1961 for the Mediator to meet the parties and set up an eligible list.

9. At the meeting held by Mediator Wyatt to consider establishing an eligible list, the FEIA was represented by two attorneys, an economist and a member of the FEIA, who verbally raised a number of objections to holding an election. The Mediator reported this situation to the Board, and a telegram was dispatched to the FEIA representatives requesting them to put their objections in writing for the Board's consideration. While the Board's mediators conduct the investigation of representation disputes, under the Board's customary practices, questions at issue between the parties concerning eligibility of employees, preponderance of service, and certain other matters not here directly involved, must be decided by the Board, not the mediator.

10. On July 5, 1961, the Board received a letter from attorneys of the FEIA commenting on the meeting held by Mediator Wyatt at Los Angeles, California, on that date. The objections of the FEIA to holding an election in this case were received by the Board on July 10, 1961, in the form of a letter from an FEIA attorney dated July 8, 1961. Letters dated July 10, 1961 and July 13, 1961, respectively, from an attorney for the Second Officers Association relative to the matters set forth in the said letter of the FEIA attorney, dated July 8, 1961, were also received by the Board.

11. On July 17, 1961, the Board received a copy of a letter from the Civil Aeronautics Board to Mr. Ronald A. Brown, President of the FEIA, dated July 7, 1961, regarding a "*Complaint of Flight Engineers' International Association v. Western Air Lines, Inc.*, alleging violations of the Railway Labor Act and the Federal Aviation Act, CAB dock 12223." In rejecting the FEIA allegations, the letter noted the various matters which were considered in that proceeding, including all matters of record in the cases of *Western Air Lines, Inc. v. Flight Engineers' International Association*, Civil Action No. 178-61 HW (USDC, S.D. Cal.), *Flight Engineers' International Association v. Western Air Lines, Inc.*, Civil Action No. 362-61-PH (USDC, S.D. Cal.), and *Western Air Lines, Inc. v. Flight Engineers' International Association*, Civil Action No. 510-61-PH (USDC, S.D. Cal.) and the inapplicability of Executive Order 10922 to the FEIA position.

12. During the course of the Board's proceedings, the Board was aware of a decision issued on April 14,

1961 by District Judge Hall of the United States District Court for the Southern District of California in *Flight Engineers' International Association v. Western Air Lines, Inc.*, Civil Action No. 302-61 PH, reported by the Bureau of National Affairs at 48 LRRM 2487, stating in part:

> "On February 17, 1961 the flight engineers who were employed by Western Air Lines failed to show up for work. The Union says there was no Union sponsored strike. If there was no strike, the court is compelled to the conclusion that the flight engineers individually each of them simply quit their jobs.
>
> "In this connection the following fact is important: On February 18, 1961 the Company requested each flight engineer individually to return to work, and each refused, although in the meantime a lawful injunction had been secured enjoining the strike, and the Company thereupon terminated all of the flight engineers who had refused to show up for work on the payroll."

13. The National Mediation Board met on July 18, 1961, and gave due consideration of all the information before it, including the points raised by the attorneys for the FEIA and the Second Officers Association, the decision of the Civil Aeronautics Board noted above in paragraph 11, the decision of Judge Hall noted above in paragraph 12, and the application of the Board's own Rules and Regulations governing the handling of representation disputes to the various contentions of the parties regarding the eligibility of present and former employees of Western Air Lines, Inc., employed as Flight Engineers. In this connec-

tion, the Board gave particular consideration to the FEIA contention that the former Flight Engineers of Western Air Lines, Inc., are eligible to participate in the election under Rule 6 of the Board's Rules and Regulations which reads as follows:

> "6. *Eligibility of dismissed employees to vote.*
>
> "Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

Upon consideration of all of the foregoing matters, the Board decided that the former flight engineers were not eligible under this rule and reached the decision set forth in the Board's telegram of July 19, 1961, to an FEIA attorney which states:

> "The National Mediation Board has fully considered all of the objections presented or asserted by you in connection with NMB Case No. R-3483 and finds they are without merit under the Board's rules and that no sufficient cause has been presented under such rules for additional delay of the election in this case. All of said objections and requests based thereon are accordingly overruled. The Board is also of the opinion that no further hearing or argument is necessary or justified under the showing made and request for same is denied. On basis of Mediator's report of his check of

authorizations, the Board has found that a representation dispute exists among flight engineers currently employed by Western Air Lines, Inc., and directs that a mail ballot election be conducted among these employees forthwith, using eligible list prepared by the Mediator. By order of the National Mediation Board."

Mediator Wyatt was instructed by the Board in a telegram of July 20, 1961 to proceed with a mail ballot forthwith in accordance with the Board's decision.

14. On July 25, 1961, the attorneys for the FEIA telegraphed the Board that Western Air Lines, Inc., had excluded from the eligible list given the Mediator the employees performing flight engineer functions on Boeing jet aircraft. In a telegraphic reply to an FEIA attorney on the same date, the Board advised that the Mediator had been instructed to immediately secure from Western Air Lines, Inc., the names and addresses of those employees for consideration of their status as eligibles by the Board. This was done by the Mediator, and the names of 13 "Second Officers" who had worked a preponderance of their time during the period of May 15, to June 15, 1961, inclusive, performing flight engineer functions on Boeing jet aircraft were added to the eligible list by agreement between representatives of the FEIA and the Second Officers Association.

15. Ballots for all employees of Western Air Lines, Inc., working as Flight Engineers, as shown on the eligible list prepared by the Mediator were placed in the United States mail on July 24, 1961, and the ballots for the 13 additional employees referred to in paragraph 14 above were placed in the mail on July 26,

1961. The count of the returned ballots scheduled to be made on August 7, 1961, was deferred after the issuance by this Court of a temporary restraining order on August 4, 1961, which expired on August 17, 1961. The Board intends to issue a certification of the results of the election following the count of the ballots to be undertaken.

16. Plaintiff will not suffer any irreparable damage by a denial of the injunctive relief sought.

*Conclusions of Law*

In view of the foregoing, the Court concludes as a matter of law as follows:

1. That ultimate success by plaintiff in this cause is unlikely.

2. That plaintiff will not suffer irreparable damage by a denial of injunctive relief.

3. That plaintiff is not entitled to a preliminary injunction.

G. L. HART, JR.
Judge

## APPENDIX II.

### Order.

United States District Court
for the District of Columbia

Wes Chapter, Flight Engineers' International Association—AFL-CIO, 4013 Don Tomaso Drive, Los Angeles, California, Plaintiff, v. National Mediation Board, Leverett Edwards, Individually and as Chairman of the National Mediation Board, Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board, Robert O. Boyd, Individually and as Member of the National Mediation Board, 1230 Sixteenth St., N. W. Washington 6, D. C. Defendants. Civil Action No. 2509-61.

This cause came on for hearing in open Court on plaintiffs Motion For Preliminary Injunction and defendants' Opposition thereto. Upon consideration of the said Motion and Opposition and of the complaint, exhibits and affidavits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motion, and after hearing oral argument on behalf of the parties in open Court, and the Court having entered findings of fact and conclusions of law, it is by the Court on this 25th day of August, 1961,

Ordered that plaintiff's Motion For Preliminary Injunction be and the same hereby is denied.

G. L. HART, JR.
Judge

## APPENDIX III.

### Statutory and Administrative Provisions.

The provisions of the Railway Labor Act and the Rules and Regulations of the National Mediation Board which are involved (other than Section 2, Ninth of the Act which is quoted in the section of the Brief entitled "Statute and Administrative Rules Involved") include:

Section 2, First, 44 Stat. 577, 45 U.S.C. § 152, First:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Third, 48 Stat. 1187, 45 U.S.C. § 152, Third:

> "Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion

seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth, 48 Stat. 1187, 45 U.S.C. § 152, Fourth:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, . . ."

Section 2, Tenth, 48 Stat. 1189, as amended, 45 U.S.C. § 152, Tenth:

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor and upon conviction thereof the carrier, officer, or

agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail to refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Title II, Section 204, 49 Stat. 1190, 45 U.S.C. § 184:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions shall be hand-

led in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees: or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. . . ."

Rule 6, Rules and Regulations of the National Mediation Board, 29 CFR § 1206.6:

"Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dis-

missal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

Rule 7, Rules and Regulations of the National Mediation Board, 29 CFR § 1206.7:

"These Rules and Regulations shall be liberally construed to effectuate the purposes and provisions of the Act."

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*,

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor, *Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF RESPONDENT SECOND OFFICERS' ASSOCIATION IN OPPOSITION

TIM L. BORNSTEIN
1741 DeSales Street, N. W.
Washington 6, D. C.

ROBERT R. RISSMAN
257 S. Spring Street
Los Angeles 12, California

*Attorneys for Respondent Second Officers' Association*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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No. 540

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WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*,

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor, *Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF RESPONDENT SECOND OFFICERS' ASSOCIATION IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing Petitioner's complaint which alleged that the National Mediation Board had incorrectly interpreted one of its own rules?

2. Whether the District Court erred in dismissing Petitioner's complaint which alleged that the National Mediation Board had denied it due process of law by failing to exercise powers of compulsory process which the Congress has not granted the Board to exercise?

## STATEMENT OF THE CASE

On February 17, 1961, flight engineers employed by Western Air Lines "walked off" their jobs. On the same day, flight engineers represented by the same international union also "walked off" their jobs with six other air lines. As Petitioner itself suggests, these simultaneous, nation-wide walk-outs were in protest of a recent decision of the National Mediation Board (Pet. for Cert. 4).

The facts which gave birth to this litigation are succinctly stated in a decision by District Judge Hall of the Southern District of California in a related case, *Flight Engineers International Association, West Chapter, AFL-CIO* v. *Western Air Lines*, — F.Supp. —, 48 LRRM 2487 (S. D. Cal. 1961).

> "On February 17, 1961, the flight engineers who were employed by Western Air Lines failed to show up for work. The Union says there was no Union sponsored strike. If there was no strike, the court is compelled to the conclusion that the flight engineers individually each of them simply quit their jobs.
>
> "In this connection the following fact is important: On February 18, 1961, the Company requested each flight engineer individually to return to work, and each refused, although in the meantime a lawful injunction had been secured enjoining the strike, and the Company thereupon terminated all of the flight engineers who had refused to show up for work on the payroll."

After the events described above, the President appointed a fact-finding commission to study the nationwide dispute between the Flight Engineers International Association and various air lines on February 21, which excluded Western Air Lines. Executive Order 10921, 26 Fed. Reg. 1553. Two days later, on February 23rd, this Executive Order was amended to include Western Air Lines. Executive Order 10922, 26 Fed. Reg. 1655.

On April 5, 1961, the Second Officers' Association, a labor organization, filed a petition with the National Mediation Board to represent the flight engineers of Western Air Lines. Petitioner's response to this application was an assertion to the National Mediation Board, "upon information and belief," that the Second Officers' Association (SOA) was illegally assisted in violation of the Railway Labor Act.[1] As the Executive Secretary of the National Mediation Board stated in his affidavit to the District Court, "(c)harges of this nature should have been taken by [Petitioner] to the United States District Attorney for prosecution, and not to the National Mediation Board."[2] because illegal assistance by a carrier is a criminal violation of the Railway Labor Act, Section 2, Fourth and Tenth, 45 U.S.C. Sec. 2, Fourth and Tenth. Even though not required to do so, the Board granted a hearing on Petitioner's charges against SOA. At the hearing, two officers of SOA voluntarily appeared and submitted

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[1] Affidavit of Eugene C. Thompson, Executive Secretary of the National Mediation Board, p. 1, para. 3, August 10, 1961, filed in support of Defendants' Motion for Summary Judgment in the District Court.

[2] Ibid, p. 2, para. 3.

themselves to examination by Petitioner's counsel. Petitioner, not satisfied with the voluntary appearance of some SOA officers at the hearing, demanded that other officers of SOA and officers of Western Air Lines also submit themselves for examination. The Board advised Petitioner that the Railway Labor Act did not confer subpoena power on the Board and that it could not require the attendance of witnesses or the production of documents demanded by Petitioner.

Following this hearing, the Board issued its "Findings Upon Investigation" in which it reached these conclusions as to Petitioner's charges against SOA (Pet. for Cert., Appendix C, p. 28):

> "The Board has carefully reviewed the transcript of the hearing and has also examined photostatic copies of the minutes of the several meetings of The Second Officers' Association, as well as a copy of their proposed Constitution and By-Laws. It is not necessary here to review the testimony presented at the hearing. It is sufficient to say that no fact was established from which even an inference—to say nothing of a conclusion — can be drawn supporting either of the charges made by FEIA."

Concluding that SOA's application for an election was valid, the National Mediation Board proceeded to prepare an eligibility list for a mail ballot election among the flight engineering personnel of Western Air Lines. Petitioner contended that the former Western flight engineers, who had participated in the February 17th "walkout," were entitled to vote in this election on the grounds that they were "dismissed" employees whose requests for reinstatement are "pending before proper authorities . . ." within the meaning of Rule 6, 29 C.F.R. Sec. 1206.6, of the National

Mediation Board. Counsel for all parties submitted memoranda to the Board on this question, discussing the legal and factual issues at length and in great detail. On July 20, the Board ruled against Petitioner's eligibility contentions and directed that the election, which Petitioner had succeeded in delaying for several months, be conducted "forthwith" (Pet. for Cert., Appendix D, p. 29).

Petitioner then instituted this action in the U. S. District Court for the District of Columbia to enjoin the election. A temporary restraining order was granted on August 3, 1961. Upon its expiration, Petitioner applied for a preliminary injunction which was denied on August 17. Defendants' motion for summary judgment was thereafter granted on October 18 on the ground that the complaint failed to state a claim on which relief could be granted (Pet. for Cert., Appendix A, p. 15). Petitioner's cross-motion for a summary judgment was simultaneously denied, and the complaint was dismissed.

On September 1, 1961, the Board counted the ballots in the election. Respondent SOA won this election by a substantial majority over Petitioner and was formally certified as the bargaining agent for Western's flight engineers.

After dismissal of the complant, Petitioner filed a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit. Before any proceedings were had in the Court of Appeals, however, Petitioner moved to have the record certified to this Court for the purpose of presenting its Petition for Certiorari under Rule 20 of the rules of this Court.

## ARGUMENT

### I. THIS CASE IS NOT ONE OF "IMPERATIVE PUBLIC IMPORTANCE" AND DOES NOT "REQUIRE IMMEDIATE SETTLEMENT IN THIS COURT" WITHIN THE MEANING OF RULE 20.

By-passing the Court of Appeals for the District of Columbia Circuit, Petitioner has filed its petition for certiorari in this Court under Rule 20. Rule 20 provides that such petitions will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

Admittedly, this case may be important to Petitioner, but all litigants regard their own actions with a subjective anxiety which may not be shared by impartial observers. The petition simply does not show why this case is one of "imperative public importance" or why "normal appellate processes" must be circumvented. Indeed, Petitioner does not even contend that this case is one of "imperative public importance" within the meaning of Rule 20. Petitioner merely contends that (Pet. for Cert. 8):

> "This case, together with the *UNA Chapter* case, supra, presents issues of great importance to the proper enforcement of the Act and to administrative law generally. . . ."

It is not contended that drastic and irrevocable consequences depend upon the outcome of this case, as in *Ex parte Quirin*, 317 U.S. 1, or that far-reaching constitutional and economic consequences inhere in this case, as in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579. This case concerns only one election among approximately 100 employees of a single employer. Elections of this kind are conducted by the National

Mediation Board and the National Labor Relations Board every day. In most elections of this type, there are disputes between the parties over eligibility issues, which Petitioner maintains is its "prime claim" here (Pet. for Cert. 8). In short, this is a routine case of agency action in a disputed election situation, one of hundreds decided by federal labor agencies each year.

Under the Railway Labor Act, there is no provision for judicial review of the agency's eligibility rulings in election cases because Congress prescribed that there "was to be no dragging out of the controversy into other tribunals of law." *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297. Faithful to this Congressional prescription, the District Court concluded that Petitioner's complaint failed to state a claim on which relief could be granted. In the circumstances of this case, therefore, there plainly is no justification for circumventing normal appellate procedures.

Petitioner's desire to have the instant case considered with *UNA Chapter, Flight Engineers International Association* v. *National Mediation Board*, No. 531, involving a "craft or class" determination by the Board, is legally inexplicable. The factual and legal issues in these two cases are different, and the actions are unrelated. Assuming, *arguendo*, that these cases raise substantially the same issues, how can Petitioner assert that this case is one of "imperative public importance," justifying circumvention of the Court of Appeals, where no such contention was advanced on behalf of the *UNA Chapter* case? The *UNA Chapter* case followed normal appellate procedures.

Although Petitioner's convenience might be served by circumventing the Court of Appeals, there is no

other apparent justification for allowing this direct appeal.

**II. THE DISTRICT COURT CONSIDERED PETITIONER'S CLAIM AND CORRECTLY APPLIED PRINCIPLES ESTABLISHED BY THIS COURT.**

Petitioner's "prime claim" is that the Board incorrectly interpreted its own rules in determining that the former flight engineers of Western Air Lines were not entitled to participate in this election. Rule 6, the rule in question, provides that:

> "Dismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections. . . ."

Based on the facts before it and the written memoranda of the parties, the Board concluded that these employees were not entitled to participate in this election. Although the Board's order did not set forth its reasoning, it is plainly supportable on the basis of the facts.

Petitioner argued to the Board that the right of these former employees to reinstatement was "pending before proper authorities" so as to entitle them to vote. Respondent SOA argued to the Board that for many reasons the claims of these former employees were not properly pending before any "proper" authority within the meaning of Rule 6. The Board could have found that these claims for reinstatement were not properly pending before "proper authorities" within the meaning of Rule 6.[3]

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[3] See Brief for Respondent Western Air Lines, Inc., In Opposition, pp. 12-13, footnote #8, where six distinct grounds are set forth to show that requests for reinstatement were not properly pending before any "proper authority."

Petitioner also argued that these former employees were "dismissed employees" within the meaning of Rule 6. Respondent SOA argued that they had "simply quit," as Judge Hall of the U.S. District Court for the Southern District of California had found. The Board could also have found that Rule 6 was inapplicable because these employees had "simply quit."

On the basis of these contentions, *inter alia*, the Board ruled against Petitioner. This is not, therefore, a case in which the agency has violated a Congressional mandate, as in *Leedom* v. *Kyne*, 358 U.S. 184, or where an agency has refused to follow its own procedural rules, as in *Accardi* v. *Shaughnessy*, 347 U.S. 260. This is the garden variety kind of administrative proceeding in which an agency, interpreting its own rules in a rational manner, has ruled against the arguable contentions of a party. Such routine agency decisions are simply foreclosed from judicial review, *Switchmen's Union* v. *National Mediation Board*, *supra*, for otherwise the federal courts would be flooded with litigation to review arguable interpretations of agency rules and regulations.

Petitioner's assertion that the "primary issue presented" is "whether the District Court has power to adjudicate a claim and grant relief in Board representation cases under any circumstances" is an extraordinary exaggeration of the substantive issues in this case (Pet. for Cert. 3, footnote #1). If the Court should decide to review this case, it would merely be called upon to determine whether the Board's interpretation of its own rule was reasonable, not whether there are "any circumstances" under which the District Courts should review decisions of the Board. *Leedom* v. *Kyne*, *supra*, clearly reveals the circum-

stances under which the District Courts may review otherwise unreviewable agency actions, and *Switchmen's Union* v. *National Mediation Board*, *supra*, clearly reveals the circumstances under which the District Courts may not review agency actions. Petitioner's assertion is that this case is more like the *Leedom* case. The record shows that it is clearly within the holding of *Switchmen's Union*. There are no new or undecided issues of administrative law presented by this case.

Petitioner's second contention is that the Board's refusal to require the production of certain named witnesses and documents in the hearing on Petitioner's charges against SOA was a denial of due process. The Board has no subpoena powers. Charges of illegal assistance to a labor organization by a carrier should properly be referred to the United States Attorney to be criminally prosecuted. Several officers of SOA voluntarily submitted themselves to examination by Petitioner's attorneys. Although it was not required to do so under Section 2, Ninth, of the Railway Labor Act, the Board granted Petitioner a full hearing to present such evidence as it chose to present. Finding insufficient evidence in this hearing to support even an "inference" that SOA had been illegally assisted, the Board concluded that SOA's application for an election was entitled to be entertained.

Petitioner's argument, reduced to its essence, is that the Board denied it due process by refusing to exercise powers which Congress has not authorized the Board to exercise. This is a novel due process argument. Describing the Board's statutory powers in *Switchmen's Union*, this Court observed that Congress gave the Board only the functions of a "referee," but "no

enforcement functions." At 304 of 320 U.S. If there is a lack of wisdom in Congress' statutory regulation of labor relations in this industry, neither the Board nor the courts can substitute their judgment for that of Congress. Congress' asserted lack of wisdom, however, has not heretofore been regarded as a deprivation of due process.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

TIM L. BORNSTEIN
1741 DeSales Street, N. W.
Washington 6, D. C.

ROBERT R. RISSMAN
257 S. Spring Street
Los Angeles 12, California

*Attorneys for Respondent*
*Second Officers'*
*Association*

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No. 540

# In the Supreme Court of the United States

OCTOBER TERM, 1961

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WEB CRAFTERS, PAPER EMPLOYEES' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

*v.*

NATIONAL MEDIATION BOARD; LAWRENCE EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEAL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; HERBERT O. BOYD, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; WESTERN AIR LINES, INC., SECOND OFFICERS' ASSOCIATION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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BRIEF FOR THE RESPONDENTS NATIONAL MEDIATION BOARD, EDWARDS, O'NEAL AND BOYD IN OPPOSITION

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ARCHIBALD COX,
*Solicitor General,*
*Department of Justice, Washington 25, D.C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL–CIO, PETITIONER

*v.*

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; ROBERT O. BOYD, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; WESTERN AIR LINES, INC., SECOND OFFICERS' ASSOCIATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS NATIONAL MEDIATION BOARD, EDWARDS, O'NEILL AND BOYD IN OPPOSITION

This petition seeks a writ of certiorari prior to judgment in the court of appeals. The case raises the issue whether a National Mediation Board determination under Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth, with respect to employee eligibility to vote in a representation election is subject to

judicial review.[1] This issue of "imperative public importance," petitioner asserts, is similar to that presented in No. 531, *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board,* in which a petition for a writ of certiorari is now pending, and warrants concurrent consideration of the cases (Pet. 2–3).

To the extent this case raises a question concerning the availability or scope of judicial review presented in No. 531, the government opposes the petition on the grounds set forth in its brief in opposition filed today in that case. Petitioner's attack is upon the Board's determination of employees eligible to participate in a representation election. Section 2, Ninth, of the Railway Labor Act expressly imposes upon the Board the duty of making this determination. The non-reviewability of its action pursuant thereto is well settled. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, and cases cited at pages 9–10 of the government's brief in opposition in No. 531. Should the Court deny certiorari in No. 531, *a fortiori* the instant petition should be denied.

There are additional compelling reasons for rejecting this petition. It fails wholly to make the showing required by Rule 20 "that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require imme-

[1] The election has been held and the Board has certified the respondent Second Officers Association (SOA) as the appropriate bargaining agent for flight engineers employed by Western Airlines. Petitioner union, which lost the election, has unsuccessfully challenged the Board's determination in the district court but has not obtained a judgment in the court of appeals.

diate settlement in this court." There is no national emergency or threat to the country's safety, health or welfare. Cf. *Youngstown Co.* v. *Sawyer,* 343 U.S. 937, and other cases cited in Rule 20. Nor do *Bolling* v. *Sharpe,* 347 U.S. 497, and *Taylor* v. *McElroy,* 360 U.S. 709, cited by petitioner, warrant bypassing the court of appeals here. *Bolling* involved the constitutional issue of school segregation in the District of Columbia. The court invited the expedited petition for certiorari because the same question with respect to state schools was already before it on direct appeal under 28 U.S.C. 1253. *Taylor* is inapposite as the government did not oppose the granting of the petition. See Memorandum for the Respondents, p. 5, filed December 8, 1958, *Taylor* v. *McElroy, supra.*

The similarity between this case and No. 531 is limited to a common question concerning the availability of judicial review. The factual framework within which the issue arose here differs markedly and as a result petitioner advances several substantive contentions not present in No. 531, including allegations that the Board acted in violation of its rules (Pet. 3), that a hearing voluntarily afforded by the Board was inadequate (Pet. 3–4) and that the Board failed to comply with the requirements of the Railway Labor Act regarding allegations that respondent SOA union was employer-dominated (Pet. 11). While we do not believe that these contentions take the case out from under the rule of *Switchmen's Union,* the issues presented are distinct from those in No. 531. Under the circumstances, before the Court is asked to rule upon these different issues, it

should have the benefit of the judgment of the court of appeals. The petition should therefore be denied and petitioner left to follow normal appellate processes. Indeed, petitioner may expect that its constitutional claims will receive full review in the court of appeals, as did those of petitioner in No. 531 even though found insubstantial. *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board,* 294 F. 2d 905.

## CONCLUSION

For the foregoing reasons, and those set forth in our brief in opposition in No. 531, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

DECEMBER 1961.

# Supreme Court of the United States

## REPLY BRIEF OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

PETITIONER

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, Jr., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF OF PETITIONER

1. The short answer to the objections based upon bypassing the Court of Appeals, the only ground of the Govern-

ment Opposition and the primary ground of the others, Western Opp. 9, SOA Opp. 6-8, is "that the Court has granted such petitions in cases where the same issue was already before the Court in another case." Memorandum for the Government, *Taylor* v. *McElroy*, No. 504, October Term, 1958, p. 5, with ample citation of authority. Petitioner here is of course assuming that the Court will have granted the companion petition in the *UNA Chapter* case, No. 531 of the current Term, being considered herewith. There can be no doubt that this case adds "a broader factual basis" for the Court's consideration of the judicial review issues, and such "broader factual basis" is the rationale for the bypassing of the Court of Appeals. Memorandum for the Government, *Taylor* v. *McElroy*, No. 504, October Term, 1958, p. 4. The "common question concerning the availability of judicial review" in *UNA Chapter* and this case is conceded. Gov. Opp. 3. Accordingly, there is every reason and authority under Rule 20 to grant this petition at this time.

2. The contention that the *Accardi* rule is irrelevant because confined to "procedural" matters is fanciful. Western Opp. 10-11, SOA Opp. 9. No such categorization is in point because the rule applies to *all* "Regulations" for they have "the force and effect of law". *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265. "In short, so long as the regulations remain operative," the agency must adhere to them scrupulously. *Id.* at 267. The "principles established" in *Accardi* are "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the adminsitrative action under review is discretionary in nature." *Service* v. *Dulles*, 354 U.S. 363, 372.[1]

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[1] The quotation regarding "procedural sword" is not from the opinion of the Court in *Vitarelli* v. *Seaton*, a fact unmentioned at Western Opp. 10. As indicated in the quotation in the text, it is irrelevant whether or not the Board actions here were "discretionary" or "reasonable". Western Opp. 12, SOA Opp. 8-9.

3. As regulations have the force of law, the attempted distinction of *Leedom* v. *Kyne* fails. See Western Opp. 10, SOA Opp. 9. There is jurisdiction to adjudicate petitioner's claim that the Board has plainly violated an express mandate of the law relating to employees' rights in bargaining groupings and elections, just as there was in *Leedom* v. *Kyne*.

4. Petitioner's claim which must be asumed valid in reviewing a judgment of dismissal for failure to state a claim upon which relief could be granted is that the Board had no legal authority under its regulations to deny the flight engineers it represents the right to vote in this vital election. Petitioner does not claim that the Board admitted its violation. "It would be naive to expect such a heavy-handed way of doing things." *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267. This Court must determine whether or not petitioner should have been afforded an opportunity to prove his claim. The ultimate propriety of the Board's order is not here in issue; that remains to be tried and decided. The issue here is judicial power to afford relief should petitioner's claim be proved. At this procedural stage, it may be reiterated, there is no possible contradiction of the allegations of petitioner's complaint. Indeed, at no point has the Board indicated the basis, if any, for its action; nor the consideration, if any, given the contentions raised by petitioner at the time or those now being raised by respondents to forestall review of this important issue by this Court.

5. On the due process and statutory interpretation issues involved in the delineation of the Board's obligations when an issue of unlawful employer assistance is put before it, respondents rely most heavily on *Switchmen's Union* Western Opp. 13-14, SOA Opp. 8-11. But they make no effort to distinguish the *subsequent Railway Conductors* case, 323 U.S. 166, in which certiorari was granted by this Court because of the manifest importance of these issues; and the issues were not resolved only because the Board was not a party respondent. Those issues remain for the

consideration of this Court; and this case is a suitable instrument for such consideration.

6. The general importance of this case is emphasized if it is indeed the fact that the Board actions here present "a garden variety" example of its procedures and decisions. SOA Opp. 9. For any other agency, it would be most extraordinary to be routinely charged with actions plainly excessive under the agency's own regulations and its governing statute. Whether or not this Board has in fact made a habit of disregarding the law—and if so, whether this habit has been created or encouraged by the Board's patent assumption that it is insulated from judicial review however highhanded its conduct—the governing consideration here is that jurisdiction to adjudicate this petitioner's claims of excessive actions in this case has been denied by the Court below; and that this denial plainly violates the strictures of this Court in *Accardi* v. *Shaughnessy* and *Leedom* v. *Kyne*.

## CONCLUSION

For the reasons spread upon the papers in this case and the companion *UNA Chapter* case, this petition should be granted, and this case set down for argument together with *UNA Chapter*.

Respectfully submitted,

I. J. Gromfine.
Herman Sternstein.
William B. Peer.
1001 Connecticut Ave., N. W.,
Washington 6, D. C.

Isaac N. Groner.
1411 K Street, N. W.,
Washington 5, D. C.
*Attorneys for Petitioner*

*Of Counsel:*

Zimring, Gromfine and Sternstein
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

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